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November 18, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338

Dear Ms. Dortch:

SBC Communications Inc. ("SBC") submits this *ex parte* letter to highlight the need for Commission action to ensure that the decisions it makes in this proceeding are promptly implemented and not thwarted by parties with an obvious interest in perpetuating the Commission's prior, vacated unbundling rules.

The *Triennial Review Order* took effect more than 13 months ago. In the wake of that order, however, CLECs and numerous state commissions have repeatedly seized on any conceivable ambiguity or argument to stall implementation and thereby to prevent the Commission's rules from taking effect. As a result, today, notwithstanding this Commission's express direction that parties should promptly negotiate conforming agreement language to implement those rules – and its statement that failure to do so would constitute bad faith – *the vast majority of CLECs have yet to agree to amend (nor has any state commission required them to amend) their interconnection agreements to implement that order in a single SBC state.* That is true even as to unbundling determinations that either were never challenged in the D.C. Circuit or were challenged and upheld. The upshot is that the SBC ILECs are still providing these network elements at below-cost rates, even though the Commission definitively found, more than a year ago, that such elements do not satisfy the impairment test and that, as a result, unbundling of those elements was contrary to law and sound public policy.

This Commission should take resolute action here to ensure that the rules it promulgates in this proceeding do not meet a similar fate. To accomplish this, the Commission must, first and foremost, expressly preempt any state commission action purporting to countermand a Commission decision to limit or eliminate a prior unbundling requirement. Equally important, the Commission must foreclose the CLECs' from abusing the interconnection agreement change-in-law process to frustrate this Commission's rules. To this end, the Commission must either (i) make clear, as it has repeatedly done in the past, that carriers are required to comply with the Commission's new rules by a date certain and must secure any necessary agreement amendments to accomplish that result; or (ii) provide a model interconnection agreement amendment and establish a specific deadline, discussed in more detail below, at which point such an amendment will become effective in the absence of voluntary agreement. Absent action such as this, the CLECs will undoubtedly continue their concerted effort to prevent the Commission's rules from taking effect, in direct conflict with the Commission's binding determinations regarding the proper scope of unbundling under the 1996 Act.

I. The Commission Has Properly Insisted on the Importance of Promptly Updating Interconnection Agreements to Conform to Federal Law

The Commission has on two separate occasions admonished CLECs and state commissions promptly to revise interconnection agreements to conform to limitations on unbundling. First, in the *Triennial Review Order*,[1] the Commission stressed that "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry." 18 FCC Rcd at 17405, ¶ 703. Invoking the obligation to negotiate in good faith, the Commission stated that "parties may not refuse to negotiate any subset of the rules we adopt herein." *Id.* at 17406, ¶ 706. In addition, the Commission instructed that "state commission[s] should be able to resolve" any disputes over contract language arising from the order "*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17406, ¶ 704 (emphasis added). Finally, the Commission stated that its new rules should take effect immediately, even where parties' agreements contained language stating that new rules would not take effect until there has been a "final and unappealable" change in the law. Such a change, the Commission observed, had *already* occurred, when its prior unbundling rules had been vacated. Thus, "[g]iven that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* at 17406, ¶ 705 (emphasis added).

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

Second, in the *Interim Order*[2] that the Commission released in the wake of the *USTA II* mandate, the Commission expressly authorized ILECs to initiate change-of-law proceedings before state commissions, specifically for the purpose of "allow[ing] a speedy transition in the event [the Commission] ultimately decline[s] to unbundle switching, enterprise market loops, or dedicated transport." *Interim Order* ¶ 22. Such proceedings, the Commission explained, should "presum[e] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* "Thus," the Commission continued, "whatever alterations are approved or deemed approved by the relevant state commission *may take effect quickly* if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Id.* ¶ 23 (emphasis added).

The message from these pronouncements is clear. It is "unreasonable and contrary to public policy to preserve" the Commission's pre-existing rules, even "for months," following the adoption of final rules, *Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 705, and state commissions should accordingly act now to ensure a "speedy transition" upon the adoption of final rules in this proceeding, *Interim Order* ¶ 22. This message makes perfect sense. A change of law provision reflects the parties' intent and recognition that their agreement should reflect the underlying law. When parties unnecessarily delay the execution of conforming contract amendments, they are thus not only thwarting the law and Commission policy, but also violating the spirit and intent of their own interconnection agreements.[3]

II. The CLECs and State Commissions Have Resisted Limitations On Unbundling Ordered by this Commission and the Courts

In accordance with this Commission's directives, SBC and other ILECs have attempted to conform their interconnection agreements to governing federal law. SBC began this initiative on October 30, 2003, when it sent out a letter notifying all CLECs in SBC's ILEC operating areas of their duty to amend their interconnection agreements in the wake of *USTA I* and the *Triennial Review Order*. SBC sent another letter on March 12, 2004, reminding all CLECs of the same duty, as well as of their duty to amend in light of *USTA II*. SBC sent yet a third letter upon issuance of the *USTA II* mandate, again reminding all CLECs of the duty to conform their agreements to existing law.

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[2] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-179 (Aug. 20, 2004) ("*Interim Order*") (subsequent history omitted).

[3] While decisions eliminating unbundling obligations are straightforward and easy to implement, decisions imposing new or changed obligations may require negotiation over new or modified terms and conditions. In addition, new unbundling obligations would presumably require the development of new recurring and/or non-recurring rates. The concerns expressed in this letter are therefore directed at the unnecessary and uncalled-for delay in implementing federal law in instances, such as where unbundling obligations have been limited or eliminated altogether, that should not require extensive negotiation or proceedings to develop new rates.

Despite SBC's many attempts to engage CLECs in the amendment process, the vast majority of CLECs have refused to implement changes to their agreements to reflect the decisions narrowing federal unbundling requirements, including even the portions of the *Triennial Review Order* that were not challenged in the D.C. Circuit or were upheld by that court. In addition, many of these CLECs are resisting efforts to update UNE terms (to reflect accurately the decisions set forth in the *Triennial Review Order* that no longer require the unbundling of certain UNEs) in *new* agreements that they are negotiating and arbitrating with SBC. Although SBC believes that these efforts are unlawful, these CLECs seeking to achieve by delay what they could not achieve either before this Commission or in court: the perpetuation of unbundling requirements that, as the Commission itself has expressly found, are contrary to the 1996 Act and sound policy.

The CLECs' efforts to resist implementation of current unbundling rules have in many cases been abetted by state commissions. Indeed, just yesterday, NARUC announced that it had adopted a resolution specifying that state commissions "should . . . have authority to require unbundling in addition to that required by the FCC's [rules]."[4] That is no surprise, as some state commissions have already insisted they enjoy just such a role. In California, for example, a majority of the PUC has determined that, irrespective of this Commission's view on the matter, the PUC has independent state law authority not only to order unbundling of elements that this Commission itself has said should *not* be unbundled, but also to do so irrespective of the "necessary" and "impair" standards set out in the 1996 Act.[5] In addition, in September of this year – after the *Interim Order* was released – the California Public Utilities Commission issued a decision setting new UNE rates, including rates for high-capacity loops.[6] Although the *Interim Order* by its terms expressly forbids state commissions from reducing UNE rates for elements affected by *USTA II*, the California PUC ordered such reductions anyway, slashing SBC's DS1 loop rates by approximately 40%. In doing so, the California PUC acknowledged the Commission's decision in the *Interim Order* to foreclose such reductions, but it gave that decision the back of its hand, asserting that it was "inconceivable" that the Commission's order actually meant what it said.[7]

The Illinois Commerce Commission has similarly failed to implement this Commission's current unbundling rules. As this Commission is aware, the *Interim Order* proposed a second

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[4] Press Release, *NARUC Clears Twenty One Resolutions in Final Business Session* (Nov. 17, 2004).

[5] *See* Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop, D.03-01-077, R.93-04-003 (Permanent Line Sharing Phase), at 15-16 (CPUC Jan. 30, 2003) (Attach. B hereto). Although the California PUC stayed this decision in the wake of the *Triennial Review Order*, it lifted that stay in April of this year. *See* Opinion Granting Motion to Vacate Stay in Decision 04-03-044, I.93-04-002 (Cal. PUC Apr. 22, 2004).

[6] *See* Opinion Establishing Revised Unbundled Network Element Rates for Pacific Bell Telephone Company d/b/a SBC California, D.04-09-063, A.01-02-024 (CPUC Sept. 23, 2004) (Attach. A hereto).

[7] *See id.* at 256.

six-month transition period, to take effect on issuance of final rules, while at the same time *mandating* that ILECs could initiate proceedings to ensure that final rules take effect as quickly as possible. In Illinois, however, the state commission got it exactly backwards. The ICC ruled that the second six-month transition period is *mandatory* (and must be incorporated into interconnection agreements today), unless the FCC issues rules *reinstating* the unbundling rules vacated in *USTA II* (in which case those reinstated rules take effect).[8] But, if the FCC decides not to require unbundling of any *USTA II*-affected network elements, that would be a distinct change-of-law event that will not be dealt with unless and until it occurs.[9] The ICC has thus managed to interpret the *Interim Order* – which put in place interim rules to last for at most six months, while instructing state commissions to prepare to rapidly implement final rules limiting unbundling – to require, at a minimum, six months *more* of continued unbundling, while utterly ignoring the Commission's instruction to prepare to implement final rules. As it did so, moreover, the ICC, echoing the California PUC, highlighted its intent to rely on its purported authority under state law to mandate continued unbundling of any elements this Commission decides *not* to unbundle.[10]

A similar pattern appears in Texas, where SBC-Texas continues to operate under its so-called "Texas 271 agreement," or "T2A," even though that agreement expired by its terms over a year ago. SBC-Texas had agreed to continue to abide by that agreement until February 17, 2005, while the Texas PUC arbitrates successor agreements in numerous phases of a consolidated proceeding. However, on September 9 of this year – almost a year after the effective date of the *Triennial Review Order* and several weeks after release of the *Interim Order* – the Texas PUC, over SBC-Texas' vigorous objection, granted a joint CLEC motion to sever all UNE issues and abate them "pending the issuance of permanent rules by the FCC."[11] It did so, moreover, in *reliance* on the *Interim Order*, which the PUC read to hold that addressing UNE issues now, in advance of the Commission's issuance of final rules, would be "wasteful."[12] The upshot is that, far from implementing the many portions of the *Triennial Review Order* that survived judicial review, much less "presum[ing] an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to" switching and high-capacity loops and transport as the Commission instructed in the *Interim Order*, the Texas PUC has relied on that

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[8] *See* Amendatory Arbitration Decision at 95, *XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Docket No. 04-0371 (ICC Oct. 28, 2004) ("*Illinois XO Decision*") (Attach. C hereto).

[9] *See id.* at 95-97.

[10] *See id.* at 48-49 ("We conclude that our unbundling decisions, as well as the [state statutory] authority on which they are premised, presently determine the state-based unbundling obligations of SBC. . . . Therefore, ICA provisions that reflect these obligations and rights . . . should be included in the SBC-XO amended ICA.").

[11] *See* Order Abating Track 2, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement* (TPUC Sept. 9, 2004) (Attach. D hereto).

[12] *See id.* at 2 (internal quotation marks omitted).

order to abate further review, and thereby required SBC-Texas to continue to provide maximum unbundling.[13]

Nor is SBC alone in facing state commissions intent on preserving maximum unbundling and disregarding the Commission's instructions to the contrary. Following the *Triennial Review Order*, Verizon initiated proceedings in numerous states in order to implement the rules adopted in that order. But notwithstanding the Commission's express instruction to both the CLECs and the states to revise agreements promptly rather than awaiting "any reconsideration or appeal of [the *Triennial Review Order*]," 18 FCC Rcd at 17406, ¶ 705, the state commissions simply refused to do so. Thus, for example, the North Carolina Utilities Commission abated Verizon's proceeding, on the ground that "it makes no sense" to proceed "where the underlying rules may be changed" as a result of pending appeals.[14] The New Hampshire Public Utilities Commission also refused to entertain Verizon's petition, purportedly because the pending appeals rendered

[13] This is not the only example related to Texas. In October of 2002, the Texas PUC ordered, among other things, the unbundling of (1) local switching (without exception); (2) multiplexing on a stand-alone basis; (3) digital cross-connect systems (DCS) on a stand-alone basis; and (4) Operator Services/Directory Assistance services notwithstanding SBC-Texas' offering of a customized routing solution. In each case, the Texas PUC ordered unbundling in the absence of an FCC rule requiring that unbundling, or required the unbundling without the limitations set out in federal law. For example, the Texas PUC made clear that it would not follow the FCC's rule (at least in the case of switching) even if SBC-Texas satisfied the FCC's 4-line carve out exception. The Texas PUC took issue with the evidence relied upon by the FCC, and expressly rejected the FCC's determination regarding unbundled local switching, and concluded that it had authority under state law to "adopt an order relating to the issue of unbundling of local exchange company services in addition to the unbundling" required by federal law. Arbitration Award at 69-75, 87, *Petition of MCIMetro Access Transmission Services, LLC, et al., for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542 (TPUC Oct. 3, 2002) (Attach. E hereto).

Other states, in addition to those described in the text, have also disregarded the Commission's limitations on unbundling. *See, e.g.*, Order, *Petition of Level 3 Communications, LLC for Arbitration of an Amendment to an Interconnection Agreement with Ohio Bell Telephone, Company d/b/a/ SBC Ohio*, Case No. 04-940-TP-ARB (Ohio PUC Nov. 15, 2004) (ordering that the "proceeding should be stayed until three months after the FCC Order addressing the UNE rules is released") (Attach. F hereto); Final Decision, *Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements*, Docket No. 03-01-02 (DPUC Dec. 17, 2003) (improperly relying on *Triennial Review Order* to mandate unbundling of abandoned coaxial plant, even though it is neither a "loop" nor part of SBC's network) (Attach. G hereto).

[14] *Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Docket No. P-19, Sub 477, Order Continuing Proceeding Indefinitely, at 2 (NCUC Mar. 3, 2004) (Attach. H hereto).

"the status of the applicable law . . . in flux."[15] The Public Utilities Commission of Nevada dismissed Verizon's petition, holding that the law that Verizon sought to implement was "unsettled" and that it would therefore "be a waste of the Commission's resources to undertake the process of amending interconnection agreements at this time."[16] And the Hawaii Public Utilities Commission dismissed Verizon's petition because, in light of the various appeals of the *Triennial Review Order*, "the implications of the TRO are not settled" and the "legal environment . . . too uncertain."[17] These cases, moreover, are the norm. Indeed, the CLECs have crowed about their success in preventing implementation even of the aspects of the *Triennial Review Order* that were *upheld* by the D.C. Circuit, explaining that Verizon's efforts to secure such relief "have now been ongoing for nearly eight months – *and have accomplished nothing*."[18]

III. The Commission Must Confirm that CLECs Cannot Abuse the Change-of-Law Process to Prevent Implementation of Federal Unbundling Rules

Absent Commission action in this proceeding, this pattern of recalcitrance and delay is almost certain to repeat itself following the issuance of final rules. If experience is any guide, at least some parties will appeal the Commission's rules, giving state commissions the same excuse they have used to put off implementation of the *Triennial Review Order*. In addition, capitalizing on the apparent willingness of state commissions to ignore this Commission's unbundling rules, the CLECs are certain to advocate maximum unbundling regardless of what this Commission says. Indeed, the CLECs have already revealed their game plan in this respect. At the same time as they fight hammer-and-tong for maximum unbundling rules before this Commission – and make overheated claims that such rules are essential to their very survival – the CLECs tell the state commissions that this Commission's section 251 unbundling decisions are absolutely meaningless. No FCC limitations on unbundling can *ever* be implemented in *any* state, they contend, because (1) "the [state commission must] undertake an independent analysis

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[15] *Verizon New Hampshire Petition for Consolidated Arbitration for an Amendment to the Interconnection Agreements with Competitive Local Exchange Carriers and commercial Mobile Radio Service Providers*, DT 04-018, Order No. 24,308 Addressing Motions to Dismiss at 9 (NH PUC Apr. 12, 2004) (Attach. I hereto).

[16] *Petition of Verizon California, Inc. d/b/a Verizon Nevada, for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Docket No. 04-0230, Order Granting Motions to Dismiss ¶ 22 (PUCN Apr. 28, 2004) (Attach. J hereto).

[17] *Petition of Verizon Hawaii, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Hawaii Pursuant to Section 252 of the Communications Act of 1934*, Docket 04-0040; Order No. 21022, at 19-20 (Haw. PUC, June 2, 2004) (Attach. K hereto).

[18] Joint CLEC Motion to Dismiss and Answer to SBC Ohio's Complaint at 14, *SBC Ohio v. ACC Telecommunications LLC, et al.*, Case No. 04-1450-TP-CSS (PUCO filed Oct. 15, 2004) ("*Joint CLEC Ohio Response*") (Attach. L hereto) (emphasis added).

of Section 251 above and beyond the FCC regulations;" (2) the state commission must "enforce SBC's merger obligations," which purportedly mandate that "SBC remains obligated to provide" all conceivable network elements on an unbundled basis; (3) "SBC also remains obligated to provide all of the existing UNEs to CLECs under [state] law;" and (4) "SBC also has an independent obligation to provide access to network elements pursuant to its ongoing obligations under Section 271," at "appropriate rate[s]" to be established *by the state commissions*.[19] The CLECs thus plan – and state commissions have shown little proclivity to prevent – endless litigation before the state commissions directed at perpetuating the very unbundling rules that this Commission has eliminated in the *Triennial Review Order* or will limit or eliminate in this proceeding. Even if the CLECs are ultimately unsuccessful in these efforts, the proceedings themselves will consume an enormous amount of time and resources.

A. The Commission Should Expressly Preempt State Commission Action Inconsistent with this Commission's Unbundling Determinations

The Commission must put an end to this charade. Because the CLECs and the state commissions will undoubtedly maintain that the rules the Commission articulates in this proceeding involve changes in law that require extensive negotiation and arbitration under the change of law provisions of interconnection agreements, it is absolutely critical that the Commission take affirmative and decisive steps to ensure that the Commission's decisions to limit or eliminate specific unbundling requirements are given immediate effect, particularly given the fact that ILECs have lived with unlawful unbundling requirements for more than *eight* years. This means, first and foremost, that the Commission must authoritatively preempt the states from countermanding *any* of the Commission's decisions to limit or eliminate specific unbundling requirements, whether pursuant to state law, section 271, purported requirements contained in the SBC/Ameritech Merger Conditions, or any other supposed "authority" that the CLECs can dream up. Absent such an authoritative statement of preemption, the Commission's rules will be left in suspended animation, as the CLECs will continue to raise, and the state commissions will continue to entertain, arguments about alternative unbundling regimes that have no basis in law but that will nonetheless provide fodder for still more delay in the implementation of the Commission's new rules.

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[19] *Joint CLEC Ohio Response* at 7, 20-21. The CLECs have made the same arguments in the other states in which SBC has sought to implement the *Triennial Review Order*. *See, e.g.*, Joint CLEC Motion to Dismiss, Motion in the Alternative for a Sufficient Pleading and for a Bill of Particulars, and Verified Answer to Illinois Bell's Amended Complaint, *Illinois Bell Tel. Co. v. 1-800-RECONEX, Inc.*, Docket No. 04-0606 (ICC filed Nov. 1, 2004) (Attach. M hereto); CLEC Coalition Motion to Dismiss, *Application of SBC Michigan for a Consolidated Change of Law Proceeding to Conform 251/252 Interconnection Agreements to Governing Law Pursuant to Section 252 of the Communications Act of 1934, as amended*, Case No. U-14305 (Mich. PSC filed Oct. 29, 2004); AT&T's Answer and Motion to Dismiss, *Complaint of Nevada Bell Telephone Co. d/b/a SBC Nevada Pursuant to NAC 704.68035 to 704.680365 to Resolve Dispute on Conforming Nevada Interconnection Agreements to Governing Law Under the Telecommunications Act of 1996*, Docket No. 04-9019 (Nevada PUC filed Sept. 29, 2004).

In this respect, moreover, it is not enough for the Commission simply to state, as it has already done, that a state commission decision countermanding an FCC unbundling determination is "unlikely" to survive a preemption analysis. *See Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 195. The CLECs have already contended, and at least one state commission has already suggested, that this purportedly "narrow" statement is utterly meaningless, unless and until the state itself actually orders unbundling under state law, and the ILEC then obtains from this Commission an order of preemption pursuant to section 253(d).[20] Merely rehashing the *Triennial Review Order*'s discussion on this issue is thus an invitation to more litigation and delay. Instead, what is needed – and what is clearly warranted in light of the CLECs' and state commissions' demonstrated intent to delay the implementation of this Commission's rules at all costs – is an express and unequivocal holding that state commissions may not, under *any* source of authority, countermand the unbundling determinations the Commission reaches in this proceeding, or reinstate unbundling requirements that have been eliminated by the Commission.

B. The Commission Should Establish a Date Certain for Implementation of Its New Rules, Including Adoption of Any Necessary Interconnection Agreement Amendments

Even an express statement of preemption, as critical as it is, is not enough to ensure timely implementation of the Commission's new rules. In addition to foreclosing such substantive avenues for thwarting the Commission's unbundling rules, the Commission must also cut off the many procedural gambits – in particular, abuse of the interconnection agreement change-of-law process – that the CLECs have used and will continue to use to attempt to delay implementation of those rules. Doing so would be quite simple. The Commission need only make clear that its decisions, including any transition period it establishes, create binding federal law and that carriers are legally obliged to take whatever steps are necessary to implement those decisions in a timely manner. If an interconnection agreement must be changed, then it is the carriers' responsibility to effect those changes in sufficient time to comply with the new federal rules.

Clarifying the law in this manner actually breaks no new ground. The Commission routinely adopts new rules and implementation deadlines and requires carriers subject to its jurisdiction to take whatever steps are necessary to comply with those rules when they take effect. Requiring that carriers make any necessary revisions to their interconnection agreements to eliminate unbundling obligations *not* required by law is no different. Indeed, such revisions are purely ministerial in nature and require far less effort and time than do most implementation efforts. No new systems need be established, no new technology or software changes need be deployed, no investment is necessary, no training is required, and no new methods and procedures need be established. All that is required is a change in a contract, the substance of which has been specified by the Commission.

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[20] *See, e.g.*, Covad's Motion to Enforce D.03-01-077, I.93-04-002 (Line Sharing Phase), at 15-17 (CPUC filed Dec. 23, 2003) (excerpt included as Attach. N hereto); *ICC Amendatory Order* at 48-49.

Indeed, the Commission has routinely insisted that carriers comply with unbundling mandates by a date certain, and imposed upon the parties subject to its rules the obligation to conform their agreements accordingly. Thus, for example, when the Commission established national, default collocation intervals, it simply directed that ILECs, regardless of what their interconnection agreements provided, file tariff and SGAT amendments within 30 days (with the tariff amendments to take effect at the earliest time permissible under state law, and the SGAT amendments to take effect 60 days after filing).[21] It then directed the parties to undertake good faith negotiations to revise their existing agreements to reflect those intervals.[22] Similarly, in the *Interim Order*, the Commission ordered continued unbundling for six months or until the issuance of final rules, "under the rates, terms and conditions that applied under [existing] interconnection agreements as of June 15, 2004." *Interim Order* ¶ 21. The Commission did so, moreover, regardless of contrary terms in existing agreements (terms that, for example, automatically excluded UNEs in the event of a judicial vacatur).[23] Likewise, as noted above, the *Interim Order* proposes a second six-month transition that would take effect upon the issuance of final rules. And, like the initial transition period, that second six-month period by its terms would take effect regardless of the language in existing interconnection agreements. *See Interim Order* ¶ 29. The Commission has thus repeatedly acted on the understanding that its unbundling rules are to be given effect by carriers subject to its jurisdiction, and it is thus incumbent upon the parties themselves to arrive at conforming language to give effect to the Commission's rules.[24] Express recognition of this fact here would establish that CLECs have nothing to gain by abusing the change-of-law process, and would ensure prompt implementation of the Commission's rules.

Nor is it the case that a mandate to carriers (including CLECs) to conform their agreements by a date certain would impermissibly tread on section 252 of the 1996 Act (and the interconnection agreement process it contemplates). For one thing, the *timing* requirements set out in section 252 – both for the parties to conclude interconnection agreement negotiations and arbitrations, as well as for state commissions to review and approve the results – are by their

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[21] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 FCC Rcd 17806, ¶¶ 34-36 (2000).

[22] *See id.*

[23] *See* Verizon Comments at 135-36.

[24] In addition to the examples described in the text, see *Local Competition Order*, 11 FCC Rcd 15499, 16016, ¶ 1042 (1996) (regardless of any agreements to the contrary, "[a]s of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."); *id.* at 16029, ¶ 1065 ("we order incumbent LECs upon request from new entrants to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination prices, and approval by the state commissions").

terms directed at *new* agreements. They have no bearing on ministerial revisions to existing agreements, and thus a mandate to parties to incorporate new rules by a date certain could in no way conflict with those timing requirements. What is more, nothing in section 252 requires state commission *approval* prior to giving effect to a contract amendment; on the contrary, as discussed below, at least one state expressly provides that negotiated agreements are effective *upon filing* with the state commissions. The Commission has expansive authority over the implementation of the 1996 Act. *See* 47 U.S.C. 201(b); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999). Particularly where nothing in section 252 requires a different result, this authority is enough, standing alone, to require carriers to conform to the Commission's existing rules by a date certain, and to make any changes to their agreements that are necessary to accomplish that result.

Apart from its general authority under the 1996 Act to require carriers to adhere to its rulings, moreover, the Commission has ample authority to create a transition away from agreements that were entered into under a regime that the federal courts have authoritatively determined to be unlawful. It is well established that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965); *see Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (noting the "general principle of agency authority to implement judicial reversals"). The unbundling obligations that are embodied in existing interconnection agreements – and that the CLECs are now fighting so hard to sustain – are the direct result of the Commission's prior, unlawful unbundling orders. To give full and fair effect to the Supreme Court's and the D.C. Circuit's vacaturs of those orders, the Commission must make clear that change-of-law (or other) provisions in an interconnection agreement cannot be used to impede the implementation of the new rules promulgated by the Commission in this proceeding. Indeed, anything less would "frustrate . . . the intended effect of [the D.C. Circuit's] decree" by leaving ILECs "in effect no better off than [they were] during the entire course of the [prior] litigation." *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 594, 597 (D.C. Cir.) ("*Execunet II*"), *cert. denied*, 439 U.S. 980 (1978).

C. An Alternative Framework For the Implementation of the Commission's New Rules

If the Commission does not clarify that carriers must by a date certain comply with its rules and secure any contract modifications necessary to ensure that result, the Commission at a minimum must establish a framework to facilitate prompt revision to existing interconnection agreements. As explained above, the CLECs themselves have bragged that the halting steps the Commission took in the *Triennial Review Order* permitted the ILECs to "accomplish[] nothing" in the year since that order took effect.[25] Far more is necessary if the Commission is to prevent the same fate here. In particular, the Commission must establish both clear rules for revising interconnection agreements to conform to its new rules (in particular, those new rules eliminating requirements to provide unbundled network elements), as well as clear and serious consequences if the CLECs fail to adhere to those rules.

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[25] *Joint CLEC Ohio Response* at 14.

First, the Commission must provide a clear and concise list of network elements, including precise definitions, that are no longer required to be provided under section 251, along with a sample interconnection agreement amendment that the Commission finds to be accurate and lawful contract language eliminating these network elements from existing interconnection agreements in accordance with its order.[26] Such a list and sample interconnection agreement amendment language would prevent CLECs and state commissions from disputing that the Commission actually means what it says when it determines that a particular network element need not be unbundled, and would minimize disputes over conforming language that will give effect to the Commission's order. The approval of a sample agreement amendment, however, would not preclude ILECs and CLECs from negotiating different conforming amendment language if they chose to do so.

Second, the Commission must clearly state that the process of amending an interconnection agreement to conform with changes in unbundling requirements contained in its order and, in particular, those new rules eliminating requirements to provide unbundled network elements, should be a purely ministerial one that does not require negotiation, arbitration, dispute resolution, or protracted state review.

Third, in order to ensure that this process is a purely ministerial one, the Commission must expressly permit ILECs to offer to CLECs the Commission's sample interconnection agreement amendment itself, or an alternative amendment eliminating network elements in conformance with the Commission's order, any time after the date of release of the order. It must further find that any failure by a carrier to agree to the Commission's sample interconnection agreement amendment itself, or to a proposed amendment that is in all material respects identical to the Commission's sample interconnection agreement amendment, within 30 days of receipt of such amendment will constitute a failure to negotiate in good faith. Equally important, the Commission must further make clear that any claim regarding a failure to negotiate in good faith will be addressed expeditiously, within a set time period, and that a finding that a party has failed to negotiate in good faith will result in penalties and a true-up.

Fourth, the Commission should hold that its sample interconnection agreement amendment is effective when filed with a state commission. The Commission should further find that conforming amendment language that is in all material respects identical to the Commission's sample interconnection agreement amendment is also effective when filed but is subject to state commission review. By way of example, the Ohio PUC has a procedural rule that provides that "[a]n agreement adopted by negotiation or mediation shall become effective

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[26] An example of such interconnection agreement amendment language could be the following: "In accordance with the Report and Order, In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 and notwithstanding any other provision of this interconnection agreement between *ILEC* and *CLEC*, *ILEC* is no longer required to provide *CLEC* with the following network elements: [list the network elements that no longer are required to be provided]."

upon filing, but will still be subject to a 90-day review and approval process."[27] The Commission should establish similar procedural rules for reviewing conforming amendment language that is in all material respects identical to the Commission's sample interconnection agreement amendment (albeit with much shorter time frames discussed below) to ensure that there is no delay in the implementation of its new rules.

Fifth, the Commission should rule that if an ILEC offers a CLEC the Commission's sample interconnection agreement amendment itself and it is *not* signed by the CLEC within 30 days, then the ILEC may file that amendment with the state commission and it shall be deemed approved when filed. Any such filing with the state commission shall not prevent the FCC from considering independently allegations of bad faith negotiations. Further, the Commission should rule that if, within 30 days after receiving a proposed conforming amendment that is in all material respects identical to the Commission's sample amendment, a party to an interconnection agreement does not agree to such language, the other party may file its proposed amendment with the state commission. The state commission shall have authority to order the refusing party to sign such amendment when the state commission approves it as being in conformance with the Commission's order.[28]

Sixth, the Commission also should make clear that, in the event a state commission does not complete review of a proposed conforming amendment within 30 days after it is filed with the state commission, either party may ask the Commission to complete such review and it will do so within 30 days. It must be emphasized here that, as discussed above, there is no basis for applying the timelines for negotiated and arbitrated agreements set forth in section 252. As noted above, the amendment of interconnection agreements to conform to the Commission's new rules and, in particular, those new rules that limit or eliminate altogether the requirement to provide certain unbundled network elements, is a ministerial task that bears little resemblance to the negotiation of rates, terms and conditions for new interconnection and unbundling requirements contemplated by section 251. As a result, the negotiation, arbitration and approval time limits set forth in section 252 do not apply on their face, and should not be imported into this ministerial process of eliminating unbundling requirements that currently are contained in existing interconnection agreements.

The key consideration here is the presence of a firm end-date to the process. The steps described above would ensure that existing interconnection agreements will be revised to implement the Commission's new rules, including any transition rules, within 90 days of the effective date of the order. Although SBC believes 90 days is more than ample time to ensure that existing agreements are conformed to the Commission's new rules, the key point is that

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[27] Ohio PUC Guidelines for Mediation and Arbitration VI.B.

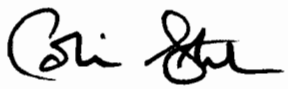
[28] The Massachusetts DTE has approved this remedy in similar circumstances, and it has been affirmed in federal court. *See* Order on Verizon New England, Inc.'s Motion for Approval of Final Arbitration Agreement or, In the Alternative, for Clarification, *Petition of Global NAPs, Inc.*, DTE 02-45 (Feb. 19, 2003), *aff'd*, Memorandum of Decision, *Global NAPs, Inc. v. Verizon New England, Inc.*, Civ. No. 03-10437-RWZ (D. Mass. May 12, 2004).

there must be a date certain by which the process is guaranteed to come to a close. Absent such a date-certain, the CLECs will have every incentive to drag out the process indefinitely, and the state commissions, which have to date shown no inclination to prevent such delay, are unlikely to do anything to stop them.

* * *

The Communications Act provides that "it shall be the duty of the Commission . . . to forthwith give effect" to a judgment reversing an FCC order. 47 U.S.C. § 402(h). That obligation takes on considerable force in this context, where ILECs have toiled for more than eight years under rules and pursuant to interconnection agreements containing unbundling requirements that have *never* been ruled lawful. To give effect to the D.C. Circuit's *USTA I* and *USTA II* mandates – and to ensure that the industry is governed by the national rules the Commission puts in place in this proceeding – the Commission must take authoritative steps to ensure the prompt implementation of its forthcoming rules. The simplest, most direct way to accomplish this aim is to clarify that CLECs must comply with those rules, and to put the onus on them to obtain any necessary revisions to their interconnection agreements. In the alternative, at a bare minimum, the Commission must put in place a clear framework, with a definitive end-date, for incorporating its new rules into existing interconnection agreements. Absent such action, the rules the Commission is laboring so hard to produce in this proceeding could be largely academic, and the perpetuation of unlawful unbundling requirements contained in current interconnection agreements could remain in effect for the foreseeable future.[29]

Yours truly,



Colin S. Stretch

cc (w/ attachments):

Jeffrey Carlisle
Jeffrey Dygert

cc (w/o attachments):

Michelle Carey	Chris Libertelli	John Rogovin
Thomas Navin	Matt Brill	John Stanley
Jeremy Miller	Dan Gonzalez	Chris Killion
Russ Hanser	Scott Bergmann	Linda Kinney
	Jessica Rosenworcel	Debra Weiner

[29] By filing this *ex parte* letter, SBC does not waive any rights that it has to challenge (on appeal or otherwise) the results of any ruling or order by any governmental body, including the Commission's resolution of this proceeding, or to otherwise take action to vindicate its rights under any regulatory or judicial decision.